Supreme Court, U.S.
FILED
APR 11 1991
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(3)

No.90-1493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

INDIAN CHILD WELFARE COORDINATOR OF THE JUVENILE COURT OF THE CHEYENNE RIVER SIOUX TRIBE, ET AL.

Petitioners,

-vs-

CHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S, GUARDIAN AD LITEM, BRIEF IN OPPOSITION

Robert Marshall Jones
Counsel of Record
P. O. Box 706
Rock Hill, SC 29731
(803) 329-2988

Counsel for Respondent,
Guardian Ad Litem for
the minor children.

QUESTIONS PRESENTED

Respondent refers to the Petition for Questions One through Four.

ADDITIONAL QUESTIONS

5. Whether the Petitioner's for Writ of Certiorari fails to comply with United States Supreme Court Rule 14 (h)?

6. Whether the Petitioner's Petition for Writ of Certiorari fails to meet the requirements of 28 U.S.C. § 1257 (a)?

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**RESPONDENT'S, GUARDIAN AD LITEM,
BRIEF IN OPPOSITION**

JURISDICTION

The judgment of the South Carolina Supreme Court denying transfer of jurisdiction of this case to the Petitioner was entered December 10,1990. The Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (a). The Respondent

submits that the Petitioner has failed to present to the Court below the questions stated in its Petition for Writ of Certiorari.

RESPONDENT'S COUNTERSTATEMENT

OF THE CASE

This action involves the fate of four physically and sexually abused young girls, BJM, TM, JC and HC (TR-299). Phyllis Coleman is the mother of all four of the girls. Audie Morrison is the father of BJM and TM (TR-35). Joe Coleman is the father of JC and HC(TR-34). BJM was born January 1, 1978. TM was born May 9, 1979. Phyllis Coleman divorced Audie Morrison in 1981 (TR-42). She moved to Rapid City, South Dakota in 1979 and became involved with Joe Coleman (TR-34). JC was born in Rapid City on October 10, 1981. HC was born in Rapid City on January 31, 1983. Phyllis and Joe were married in March, 1983.

BJM and TM have been in foster placement twice in Rapid City, South Dakota. The first time was in August, 1980, when Mrs. Coleman had left BJM with a friend who had neglected her (TR-34). The second time was in August, 1981, when Mr. Coleman placed

the children when he had to return to military duty and did not know where Mrs. Coleman was.

In 1983, Mr. Coleman left the military and in August,1983, brought the family to North Carolina, where most of his family were located (TR-35). In September, 1983, Mr. Coleman purchased land and a mobile home in the Fort Lawn community of Chester County, South Carolina. Joe and Phyllis Coleman planned to make this their permanent residence and were in the process of building a home on the property (TR-35).

On November 9, 1983, the Department of Social Services initiated an action in the Family Court removing the four minor children from the home of the Colemans (TR-295). On December 22, 1983, the Family Court determined that BJM and TM had been physically abused; that JC and HC were threatened with substantial harm if allowed to remain in the custody of the Colemans and that custody should be transferred to the Department of Social Services (TR-295). This finding has never been appealed by the Colemans.

During this time the Department entered into a program of counseling the Colemans with the aim of reuniting the family (TR-28). On January 10, 1984, the Department

advised the Petitioner the four Indian children were in its custody (TR-309). By letter dated January 26, 1984, the Petitioner advised it would seek transfer only if requested by the parents (TR-308). In May, 1984, the Department was preparing to return the children to the Colemans when allegations of sexual abuse by the Colemans surfaced (TR-59). By letter dated June 4, 1984, the Petitioner authorized a Mr. David Bald Eagle to go to Chester County, South Carolina and get the children (TR-307). On July 10, 1984, the Family Court declined a Motion by the Colemans to transfer jurisdiction (TR-269). This decision was not appealed by the Colemans or the Petitioner.

In April, 1985, the Colemans were tried in the State Court for criminal sexual conduct on BJM and TM. A mistrial resulted due to a hung jury (TR-270). Although the Petitioner alleges the jury voted 11 to 1, no record is made of how the jurors voted in a mistrial in South Carolina Criminal Courts.

On February 13, 1986, the Family Court held a civil trial on the allegations of sexual abuse and placement (TR-294). The trial court found that all four children had been sexually abused on multiple occasions and that jurisdiction be transferred to the

State agency in South Dakota (TR-299). The Colemans did not appeal the finding of sexual abuse.

The Guardian Ad Litem did appeal the transfer of jurisdiction (Pet. App.11) . On March 26, 1986, the South Carolina Department of Social Services was notified by the South Dakota Department of Social Service that it could not accept transfer of the children (Pet. App. 11). On April 4, 1986, the South Carolina Supreme Court remanded the case on the issue of placement (TR-292).

On October 1, 1986, the Family Court held a hearing on the remand. Among other things it ordered a transfer of legal custody and of physical custody to the Petitioner (TR-287). The Guardian Ad Litem appealed this decision of the Family Court (TR-284). Pending the appeal the Guardian Ad Litem and her attorney moved to be relieved. The South Carolina Supreme Court appointed the present Guardian Ad Litem and the present attorney (TR-271). On September 26, 1988, the South Carolina Court of Appeals reversed and remanded the case to the Family Court to make specific findings on whether or not "good cause to the contrary" existed to transfer jurisdiction. (Pet. App. 25) and reported at 296 S.C. 355, 372 S.E. 2d 912 (Ct. App. 1988). The Petitioner did not

seek rehearing by the Court of Appeals nor certiorari to the South Carolina Supreme Court.

After another hearing the Family Court issued its Order dated April 5, 1989, transferring jurisdiction to the Petitioner (Pet. App. 9). The Guardian Ad Litem appealed this Order. On December 10, 1990, the South Carolina Supreme Court issued its Order denying transfer of the case to the Petitioner (Pet. App. 1). The Petitioner did not file a timely Petition for Rehearing in this matter with the South Carolina Supreme Court,(Res. App. 3).

Although the Petitioner alleges at page 7 of its Petition that the Guardian "eschewed" certain arguments, it is apparent from the record below that the Guardian took nine Exceptions to the Family Court's Order and briefed each one (TR-349),

There is still pending in the South Carolina Family Court an action for termination of parental rights; which if granted would require further action for permanent placement (TR-60).

REASONS WHY THE PETITION

SHOULD BE DENIED

1. THE PETITION FOR WRIT OF CERTIORARI FAILS TO COMPLY WITH RULE 14 (h) OF THE UNITED STATES SUPREME COURT RULES, 1990.

Under 28 U.S.C. § 1257 (a), this Court has held that a federal question must have been raised, presented and pursued in a proper and timely manner at the appropriate points in the state court proceedings for the Court to have jurisdiction. Crowell v. Randell, 10 Pet. 368, 391 (1836); McGoldrick v. Compagnie Generale, 309 U.S. 430, 434 (1940); Hill v. California, 401 U.S. 797, 805 (1971).

United States Supreme Court Rule 14 (h) states that the Petitioner seeking review of a state court decision must specify in the statement of the case "the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; ***".

This Court has stated many times that when the highest state court has failed to pass upon a federal question, it will be

assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. Street v. New York, 394 U.S. 576, 582 (1969); Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n. 3 (1983).

The Petitioner failed to properly and timely raise the questions presented here in the state courts below. Even after the South Carolina Supreme Court decision of December 10, 1990, the Petitioner could have presented the questions it now presents, to the state Supreme Court by a Petition for Rehearing. Petitioner failed to timely do so.

2. THE SOUTH CAROLINA SUPREME COURT HAS FOLLOWED THE MANDATE OF THE INDIAN CHILD WELFARE ACT, 25 U.S.C. § 1901, ET SEQ.

The South Carolina Supreme Court, in its opinion, discusses the history and purposes of the ICWA. It discusses 25 U.S.C. § 1911(b) (1978) of the act. It discusses the term "good cause to the contrary". It quotes from the legislative history of the Act that the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a child custody proceeding involving an Indian child. S. Rep. No. 597,

95th. Cong., 1st Sess. 17 (1977), reprinted in 1978 U. S. Code Cong. & Admin. News 7530. It discusses the Guidelines for State Courts; Indian Child Custody proceedings 44 Fed. Reg. 67584 (1979) published by the Bureau of Indian Affairs. It cites BIA Guideline (b) (iii) (1979) which approves the modified doctrine of form non conveniens. The BIA Guidelines acknowledge that "application of this certiorari will tend to limit transfers to cases involving Indian children who do not live very far from the reservation." 44 Fed. Reg. at 67591.

The Court then discusses a number of cases from other states dealing with "geographical obstacles". In the Interest of J.R.H., 358 N.W. 2d 311, (Iowa 1984); Matter of Wayne R.N., 107 N. M. 341, 757 P. 2d 1333 (N.M. App. 1988); The Matter of N. L., 754 P. 2d 863 (Okl. 1988); In re Robert T., 200 Cal. App. 3rd 657, 246 Cal. Rptr. 168 (1988); People in Interest of J.J., 454 N. W. 2d 317 (S.D. 1990).

It is clear from its opinion that the South Carolina Supreme Court has made diligent and proper efforts to follow the mandate of the ICWA.

3. THE SOUTH CAROLINA SUPREME COURT HAS FOLLOWED THE TEACHINGS OF THIS COURT IN THE

HOLYFIELD CASE.

In Mississippi Band of Choctaws v. Holyfield,303 U.S.2021, 109 S. Ct. 1597, (1989), this Court stated that the sole issue before the Court was whether the children were "domiciled" on the reservation for purposes of 25 U.S.C. § 1911(a) [the exclusive tribal jurisdiction section of the ICWA].

Not even the Petitioner has disputed that this case comes under 25 U.S.C. § 1911 (b) which provides as follows:

> "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe."

"Good cause" is not defined in the Act itself. However, the legislative history states that the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a child custody proceeding involving an Indian child. S.Rep. No. 597, 95th Cong., 1st Sess. 17 (1977), reprinted in 1978 U.S.

Code Cong. & Admin. News 7530. The Bureau of Indian Affairs (BIA) published non-binding guidelines to aid states courts in interpreting the Act. (BIA Guidelines) See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (1979). The BIA Guidelines list several factors which may constitute "good cause" to deny transfer of jurisdiction to a tribal court. 44 Fed Reg. at 67591. One factor which may constitute "good cause" to deny transfer of jurisdiction under the BIA Guidelines is where the case "could not be adequately presented to the tribal court without undue hardship to the parties and the witnesses." 44 Fed. Reg. at 67591, BIA Guideline (b)(iii) (1979). The commentary to this BIA Guidelines points out that:

> "Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the 1911 (b), " the subsection is intended to permit a State court to apply a modified doctrine of forum non conveniens, in appropriate cases, to insure that the rights of the child as an Indian, the Indian

> parents or custodian, and the tribe are fully protected."

44 Fed. Reg. at 67591.

The doctrine of forum non conveniens is modified in the Indian child custody context so as to allow state courts to determine whether the tribal court is a less convenient forum. The BIA Guidelines acknowledge that "application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation." 44 Fed. Reg. at 67591.

It is clear that the South Carolina Supreme Court is following the Congressional Mandate under the I.C.W.A.

4. THE SOUTH CAROLINA SUPREME COURT DID NOT DENY THE INDIAN PARTIES DUE PROCESS OF LAW BY MAKING FINDINGS OF FACTS IN ACCORDANCE WITH ITS OWN VIEW OF THE PREPONDERANCE OF THE EVIDENCE.

(A) THE PETITIONER HAS NOT RAISE THIS ISSUE IN THE COURTS BELOW.

It is clear from the record below that the Petitioner has never raised the due process issue either in the trial court or appellate courts below. This Court has

repeatedly held that a federal question must be properly framed, raised, presented and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings. Godchaux Co. v. Estopina, 251 U.S. 179, 181 (1919); Beck v. Washington, 369 U.S. 541, 550-54 (1962).

(B) THE CASES CITED BY PETITIONER DO NOT APPLY TO APPELLATE COURT JURISDICTION.

The Petitioner cites this Court's holding in United States v. Reddatz, 447 U.S. 667, 677 (1979), upholding the authority of the District Court to make a "de novo determination" without having a "de novo hearing".

In Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the issue was the right to appointed counsel in every parental status termination. In Matthews v. Elderidge, 424 U.S. 319 (1976), the issue was whether due process required an evidentiary hearing before termination of Social Security disability benefits. In Morgan v. United States, 298 U.S. 468 (1935), the issue was the due process requirements of administrative procedures before the Department of Agriculture.

The South Carolina Supreme Court has

repeatedly stated that the appellate courts of the state have the jurisdiction and duty not only to correct errors of law but also to find facts in accordance with its own view of the preponderance of the evidence when the case is tried before a judge. Bates v. Bates, 213 S.C. 26, 48 S.E. 2d 612 (1948); Miller v. Miller, 299 S.C. 307, 384 S.E. 2d 715 (1989).

In this particular case the South Carolina Supreme Court had before it a Transcript of Record of the proceeding below containing three hundred fifty-five pages of testimony and exhibits.

5.THE SOUTH CAROLINA SUPREME COURT DID NOT DISREGARD THE PREFERENCE FOR TRIBAL JURISDICTION AND DID NOT CREATE A DE FACTO PREFERENCE FOR STATE COURT JURISDICTION.

The South Carolina Supreme Court went to great lengths to discuss the history of the ICWA. It limited its decision to the narrow issue of the application of the doctrine of forum non convenience as defined in the BIA Guidelines. It reviewed the decisions of other state courts in applying this guideline. In the Interest of J.R.H., 358 N.W. 2d 311, (Iowa 1984); Matter of Wayne R.N., 107 N. M. 341, 757 P. 2d 1333 (N.M. App. 1988); The Matter of N. L., 754 P. 2d 863 (Okl. 1988); In re Robert T., 200

Cal. App. 3rd 657, 246 Cal. Rptr. 168 (1988); People in Interest of J.J., 454 N. W. 2d 317 (S.D. 1990). It did not discuss other reasons which might constitute "good cause".

The Petitioner refuses to recognizes the facts: (1)that these children are several thousands of miles from their reservation, (2) that the children have had little or no contact with the reservation during their young lives, (3) that the South Carolina Court or the tribal Court still must decide the issues of termination of parental rights and permanent placement of the children, and (4) that the witnesses as to the physical and sexual abuse of the children, their care and treatment for the past eight years are all in South Carolina.

It seems clear the Petitioner is requesting this Court to substitute the Petitioner's interpretation of the facts with those found to be true in the state court. This Court should not grant certiorari to review findings of facts. While the question of facts are important to the individual litigants, they do not rise to the level of importance that would justify review. United States Supreme Court Rule 10.

6. THE SOUTH CAROLINA SUPREME COURT DID NOT

REFUSE TO CONSIDER THE RIGHTS OF THE INDIAN CHILDREN AS INDIANS, INDIAN PARENT AND THE INDIAN TRIBE.

(A) THE STATE AGENCY MADE AN ACTIVE EFFORT TO PREVENT THE BREAKUP OF THE HOME AS REQUIRED BY 25 U.S.C. § 1912 (d).

Shortly after these children were taken into protective custody, a treatment plan was started to reunite the children with their parents (TR-28). The agency was taking steps to re-unite the family when the allegations of sexual abuse surfaced (TR-59). It was only after the Court's findings of sexual abuse that the efforts stopped (TR-28). These efforts were made under both the mandates of state law and 25 U.S.C. 1912 (d). The efforts failed due to the inability to rehabilitate the parents (TR-32). The Colemans have never appealed the findings of physical and sexual abuse nor the efforts to reunite the family. The Colemans were represented by retained counsel during all the proceedings except for the last oral arguments before the South Carolina Supreme Court.

(B) THE STATE AGENCY MADE A GOOD FAITH EFFORT TO COMPLY WITH 25 U.S.C. § 1915 (b) IN MAKING ITS FOSTER CASE PLACEMENTS.

25 U.S.C. § 1915 (b) establishes certain requirements for foster care placement which shall be followed. They are as follows:

(1) A setting which most approximates a family.

(2) Within a reasonable proximity of her home.

The Act then sets up preferences which shall be followed in the absence of good cause to the contrary. They are as follows:

(1) A member of the Indian child's extended family.

(2) A foster home approved by the Indian child's tribe.

(3) An Indian foster home approved by a non-Indian agency.

(4) An institution for children approved by an Indian tribe.

When these four children were taken into protective custody, they were residing with the Colemans in Chester County, South Carolina, several thousand miles from their South Dakota reservation (TR-32). The agency started a treatment plan with the Colemans (TR-28). The agency was unable to locate any Indian foster parents nor are there any recognized Indian tribes in South Carolina (TR-45). The agency tried newspaper recruitment for emergency foster

care (TR-45). The Petitioner refused to get involved (TR-308) until the children had been in foster care for nearly eight months (TR-307).

(C) THE QUESTIONS OF THE APPLICATION OF 25 U.S.C. § 1912 (d), 25 U.S.C. § 1915 (a) AND 25 U.S.C. §1915 (d) HAVE NOT BEEN PRESENTED TO THE COURTS BELOW.

25 U.S.C. § 1912 (d) requires that efforts be made to prevent the breakup of the family. The record below indicates that the Petitioner has not raised the issue of any alleged failure by the South Carolina Department of Social Services to comply with the requirements of 25 U.S.C. § 1912 (d) in the state courts below.

25 U.S.C. § 1915 (a) lists the preferences for adoptive placements of Indian children. 25 U.S.C. § 1915 (d) establishes the social and cultural standards applicable.

This case has not reached the point of terminating parental rights which would be required before adoptive placement is considered (TR-40-41). These are the stages of the proceedings which would be governed by 25 U.S.C. § 1915 (a) and (d) when they are reached.

7. THERE ARE OTHER GROUNDS WHICH CONSTITUTE "GOOD CAUSE" NOT TO TRANSFER THE CASE TO THE TRIBAL COURT UNDER THE B.I.A. GUIDELINES.

In order to assist state courts in applying the Indian Child Welfare Act, the Bureau of Indian Affairs published Guidelines for State Courts; Indian Child Custody Proceeding, 44 Fed. Reg. 67584 (1979). It contains the following list of grounds at 44 Fed. Reg. 67591:

> "C3. Determination of Good Cause to the Contrary
>
> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
>
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
>
> (i) The proceeding was at an advanced state when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> (ii) The Indian child is over twelve years of age and objects to

the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer."

The age of the child is an important factor under the BIA Guidelines. The BIA Guidelines recognize that a child over five years of age who has had little or no contact with her tribes may suffer shock from the change of cultures a transfer may bring. Most children under five years of age can be expected to adjust more readily to a change in cultural environment. These

factors are recognized under C.3 (b) (iv) at 44 Fed. Reg. 67591.

Another "age factor" involves teenagers. The BIA Guidelines recognize that the objection of an Indian child over twelve years of age is an important criteria. In the Commentary to the BIA Guidelines, it is stated "It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives." 44 Fed. Reg. 67591.

BJM (born January 1, 1978) is now thirteen years old and has expressed to her Guardian Ad Litem her objection to being transferred to the reservation, (Res. App. 1). TM (born May 9, 1978) will be twelve years old in May, 1991, and has objected to being transferred to the reservation, (Res. App. 1). The Respondent concedes that this issue was not presented to the courts below, however, the rights conferred under the BIA Guidelines have accrued to these two children during the pendency of this action.

Although the South Carolina Supreme Court only ruled on one exception made by the Guardian Ad Litem, other exceptions were based on the BIA Guidelines. The other

exceptions (found at TR-349-350) were as follows:

" I

The Lower Court erred in its Order of April 5, 1989, in ordering the transfer of the minor children to South Dakota. The error being that all of the evidence was that such a transfer would be detrimental to the best interest of the minor children

II

The Lower Court erred in its application of the Indian Child Welfare Act. The error being its failure to properly apply "the good cause to the contrary" provisions of Chapter 25, § 1911 (b), and § 1915 U.S.C.A. to this particular case.

III

The Lower Court erred in its application of the Indian Child Welfare Act, 25 U.S.C., § 1902. The error being that a Court is required to do what is in the best interest of the Indian child.

IV

The Lower Court erred in refusing to follow the Order of Remand from the Court of Appeals. The error being the failure of the Lower

Court to make specific findings as stated in the Order of Remand which conform to the evidence in the case.

V

The Lower Court erred in finding that the proceedings were not in an advanced stage when the Petition for transfer was received. The error being such a finding was not supported by the evidence.

VI

The Lower Court erred in finding that the evidence necessary to decide the case can be adequately presented to the tribal court without undue hardship to the witnesses. The error being such a finding was not supported by the evidence.

VII

The Lower Court erred in finding that the Indian children had sufficient contact with the tribe or members of the tribe. The error being such a finding was not supported by the evidence.

VIII

The Lower Court erred in finding that the Indian children had lived for a significant period of time on the reservation and the

availability of a biological parent of two of the children. The error being that such a finding was not supported by the evidence.

IX

The Lower Court erred in finding that the removal of the children would not be disruptive and detrimental to their best interest. The error being that such a finding was not supported by the evidence."

8.THIS CASE DOES NOT MEET THE REQUIREMENTS OF UNITED STATES SUPREME COURT RULE 10.

Although the Petitioner seeks to create a conflict between the South Carolina Supreme Court's decision and the Montana Court's decision in Matter of M. E. M., 635 P. 2d 1313 (1981), the Montana Court was reviewing a termination of parental rights case under 25 U.S.C. § 1912 (f), which requires "evidence beyond a reasonable doubt" before termination of parental rights. This case has not reached that point.

It seems clear the Petitioner is requesting this Court to substitute the Petitioner's interpretation of the facts with those found to be true in the state

court. This Court should not grant certiorari to review findings of facts. While the question of facts are important to the individual litigants, they do not rise to the level of importance that would justify review. United States Supreme Court Rule 10.

CONCLUSION

The South Carolina Supreme Court carefully and properly considered and applied the Congressional Mandate of the Indian Child Welfare Act and the published BIA Guidelines for implementation of the ICWA. The South Carolina Supreme Court considered the decisions of other State Courts in applying the ICWA.

The Petition now raises questions before this Court which have not been presented to the Courts below, thus the Petition does not meet the jurisdictional requirements of 28 U.S.C. § 1257 (a). The Petition does not conform to United States Supreme Court Rule 14 (h). The Petition does not present issues which meet the standards for review stated in United States Supreme Court Rule 10.

For the reasons stated above, the Petition should be denied.

Dated: April 8, 1991

Respectfully submitted

Robert Marshall Jones
Attorney for the
Guardian Ad Litem
P. O. Box 706
Rock Hill, SC 29731
Phone- (803) 324-2988

No.90-1493

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

INDIAN CHILD WELFARE COORDINATOR OF
THE JUVENILE COURT OF THE CHEYENNE
RIVER SIOUX TRIBE, ET AL.
Petitioners,

-vs-

CHESTER COUNTY DEPARTMENT
OF SOCIAL SERVICES, ET AL.
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

APPENDIX TO
RESPONDENT'S, GUARDIAN AD LITEM,
BRIEF IN OPPOSITION

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF YORK)

I, Richard M. Steele, attorney at law, having been first duly sworn do affirm as follows:

1. That I am the Court appointed Guardian Ad Litem for two minor children, BJM and TM.

2. That I have been informed that BJM was born on January 1, 1978, and that TM was born on May 9, 1979.

3. That on March 28, 1991, I met privately with each of the girls, first together, then individually.

4. That BJM told me she did not want to go to the Cheyenne River Sioux Reservation in South Dakota; that she wanted to stay in South Carolina; and that she is now thirteen (13) years of age.

5. That TM told me she did not want to go to the Cheyenne River Sioux Reservation in South Dakota; that she wanted to stay in South Carolina, and that she will be twelve (12) years old on May 9, 1991.

6. It is my opinion that the decision of BJM and TM were made freely and voluntarily.

WITNESS my hand and seal this 28th. of March, 1991, at Rock Hill, South Carolina.

/S/ Richard M. Steele
Richard M. Steele
Guardian Ad Litem
For BJM and TM

Sworn to before me this
28th. day of March, 1991.

/S/Colleen Moon
Notary Public for South Carolina
My Commission Expires: 10-4-1999

[COPY OF LETTER OF SOUTH CAROLINA SUPREME COURT DATED MARCH 6, 1991]

George M. Hearn, Jr., Esquire
1323 Third Street
Conway, S.C. 29526

Scott B. McElroy, Esquire
1007 Pearl Street, Suite 240
Boulder, Colorado 80302

Re: Chester County Department of Social Services v. Joe L. Coleman, et al.

Gentlemen:

This is to advise that the following Order has been endorsed on your Motion for Leave to File Petition for Rehearing Out of Time in the above entitled matter:

"Motion for Leave to File Petition for Rehearing Out of Time is denied.

s/David W. Harwell A.C.J.
For the Court

Chief Justice George T. Gregory,Jr.,not participating

March 6, 1991."

By copy of this letter we are advising all counsel of record of the action of the Court in this matter.

Sincerely yours,
s/Brenda F. Shealy
DEPUTY CLERK

BFS/dmh

cc: Joe L. and Phyllis Coleman
Robert Marshall Jones, Esquire
Claude S. Coleman, Esquire

STATUTES CITED

25 U.S.C. § 1901 - Congressional findings

Recognizing the special relationship between the United States and the Indian Tribes and their members and the Federal responsibility to Indian people, the Congress finds --

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority. Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and

private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1902 -Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1911 -Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction -
An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings: declination by tribal court -

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1912 -Pending court proceedings

(d) Remedial services and

rehabilitative programs; preventive measures -

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(f) Parental rights termination orders; evidence; determination of damage to child -

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1915 -Placement of Indian children

(a) Adoptive placements: preferences-

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member

of the child's extended family ; (2) other members of the Indian child's tribe; (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences -

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with --

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(d) Social and cultural standards; applicable -

The standards to be applied in meeting

the preference requirement of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

28 U.S.C. § 1257 - State courts; appeal; certiorari - -

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.